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**BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.**

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

Revision of Rules and Policies
for the Direct Broadcast
Satellite Service

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IB Docket No. 95-168
PP Docket No. 93-253

COMMENTS OF CONTINENTAL CABLEVISION, INC.

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COMMENTS OF CONTINENTAL CABLEVISION, INC.

Continental Cablevision, Inc. ("Continental") respectfully submits these Comments in the above-referenced Notice of Proposed Rulemaking.¹ Continental is a 10% owner of PRIMESTAR and endorses the comments submitted by PRIMESTAR in this proceeding.

I. INTRODUCTION AND SUMMARY

There is no legal, factual, or policy basis for the Commission to impose cross-ownership prohibitions or behavioral restrictions on cable operators who seek to compete in the DBS business. The proposals contained in the NPRM are:

- Inexplicable in light of the fact that there is absolutely no evidence of any anticompetitive behavior in the DBS business by PRIMESTAR or any MSO;
- Anti-consumer because they would reduce the ability of PRIMESTAR to provide meaningful competition to DBS providers DirecTV (i.e., General Motors) and USSB (i.e., Hubbard Broadcasting);

¹ Notice of Proposed Rule Making, FCC 95-443, IB Docket No. 95-168, PP Docket No. 93-253 (released October 30, 1995) ("Notice" or "NPRM").

- Contrary to the pronounced trend toward deregulating telecommunications markets as evidenced by the telecommunications legislation now pending before Congress;
- Inconsistent with the competitive state of the DBS business (which has grown more than 100% in the last six months) and the larger video distribution marketplace; and
- Totally unnecessary because of provisions already contained in the PRIMESTAR Consent Decrees which provide protections of limited duration to assure the development of a competitive DBS industry.

Consequently, Continental urges the Commission to reject the proposals contained in the NPRM.

Continental also urges the Commission to impose a spectrum fee on any DBS operator who has not paid for spectrum at auction. If the Commission is truly concerned about fostering a competitive DBS business, companies like General Motors' DirecTV should not be afforded economic advantage by the Commission.

II. THE PROPOSAL TO LIMIT CABLE PARTICIPATION IN THE DBS BUSINESS IS UNJUSTIFIED; MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTORS SHOULD BE FREE TO PROVIDE SERVICE VIA ANY AVAILABLE TRANSMISSION MEDIUM

In the NPRM, the Commission notes that it only recently declined to restrict MSO participation in DBS.² However, in an inexplicable policy flip, the Commission then states that:

it now appears possible that entities affiliated with a single MVPD (and hence, with each other) could seek to control or use DBS channel assignments at more than one of

² See Tempo Satellite, Inc., 7 FCC Rcd 2728 (1992) ("Tempo II"). See also Notice at ¶ 38. The Commission states that it concluded in Tempo II that "concerns over potential anticompetitive behavior by TCI and its subsidiary were not sufficient to justify a ban on their entry into DBS." Id.

the locations capable of full-CONUS transmission. This increased level of concentration could magnify the potential that competition would be adversely affected.³

However, the Commission's reasoning is woefully insufficient to justify the radical change in policy⁴ change for one simple reason: It has always been possible for a cable-affiliated DBS operator to obtain frequencies at more than one full-CONUS orbital location, by purchasing those frequencies from a current licensee. As explained in Greater Boston, the Commission has an obligation to explain changes in policy.⁵ The possibility that a MSO affiliate could obtain full-CONUS frequencies at more than one orbital location is no change at all and, therefore, would fail the Greater Boston test.

In addition, the fears expressed in the NPRM are directly contrary to the Commission's recent conclusions regarding MSO DBS ownership. In the Tempo II decision, the Commission said:

Tempo's participation [in the DBS industry] could well accelerate the initiation of DBS service by bringing

³ Notice at ¶ 39 (emphasis added).

⁴ Such a radical shift in policy appears directed solely at PRIMESTAR, which today provides the only real competition to USSB and General Motors' DirectTV.

⁵ If the Commission now reverses its prior decision and imposes a ban on MSO participation in DBS, it must "supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 992 (1970). Here the Commission purports to "maintain the balance struck in Tempo II," and then proceeds to limit MSO entry into DBS. As discussed below, the rationale supplied by the Commission is purely speculative and lacks factual support.

valuable marketplace experience and presence and possibly enhancing access to programming

and that

existing antitrust law and Commission oversight are sufficient to prevent any conduct that is illegal or deleterious to the DBS industry and its customers, or to operators and customers in the other video entertainment distribution industries as well.⁶

The Commission does not provide any changed circumstances that would explain why this rationale no longer applies. To the contrary, as described below, the only thing that has changed since the Commission's decision rejecting DBS limits for cable is that the DBS business has become more competitive, a fact that militates against ownership limitations.

The professed basis of the Commission's fear regarding cable-DBS cross-ownership stems from the Commission's belief that allowing cross-ownership (at least of frequencies from more than one orbital position) will provide incentives for MSOs to "minimize competition from any DBS resources they controlled, and instead to coordinate their DBS activities with those of their other systems to maximize their joint profits."⁷ As an example of the behavior it fears, the Commission states that a cable-affiliated DBS operator might differentiate its DBS product rather than compete with its cable systems on the basis of price.⁸ For the reasons set forth below, these fears are

⁶ Tempo II at 2730, citing Continental Satellite Corp., 4 FCC Rcd 6292 (1989).

⁷ Notice at ¶ 37.

⁸ Id.

misplaced and the policy decisions springing from them are contrary to the public interest.

Cable television operates in the multi-channel video distribution business. Whether their programming is transmitted via coaxial cable, fiber-optic technology, microwave or high-power satellites is immaterial to most consumers and should be irrelevant for public policy reasons. The Commission already has distorted the marketplace by prohibiting cable operators from utilizing MMDS technology to extend the reach of their service or offer consumers a lower priced multi-channel video service within existing cable service areas.⁹ Restricting cable operators from providing DBS service will only compound the marketplace distortion.

Continental regards DBS as a natural outgrowth of its cable business, much as cellular technology has become, with the Commission's full approval,¹⁰ an extension of the wireline telephone business. In fact, had technologies progressed in a different order, Continental easily could foresee that there would be a different mix in its distribution balance. DBS allows Continental to serve more efficiently subscribers in sparsely

⁹ On the other hand, the Commission has found no competitive problem where telcos plan to provide video over cable facilities and MMDS in the same service area.

¹⁰ The Commission has often blessed the use of new technology to expand service to existing customers and reach new customers. See, An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, 86 FCC 2d 469, 482-86 (1981); see also 47 C.F.R. § 24.204.

populated areas. It also allows Continental to serve consumers within its franchise areas who desire digital quality pictures and sound or programming not available on its cable networks because of capacity limitations, or for other reasons. Continental cannot, and should not, abandon any feasible means of delivering multichannel video services to customers.¹¹

Continental tends to serve urban and suburban markets in major metropolitan areas. For instance, Continental serves the cities of Fresno, California; Lansing, Michigan; Jacksonville, Florida; Richmond, Virginia; St. Paul, Minnesota and approximately 40% of Los Angeles. Continental also serves suburban communities around Boston, Chicago, Cleveland, Dayton, Detroit, Miami, New York and St. Louis. If PRIMESTAR is a successful bidder for high-power DBS frequencies, Continental will be able to more effectively provide DBS as an option to consumers within these franchise areas because an 18-inch dish lends itself to installation in such areas more readily than a medium-power dish which is twice the diameter.¹² DirecTV's 60/40 balance of subscribers within cable and non-cabled areas,

¹¹ Interestingly, one of PRIMESTAR's competitors, USSB owner Stanley Hubbard, who would benefit greatly by constraints on PRIMESTAR's business, echoed this point by noting last summer that "Cable operators that are part of PRIMESTAR will have strong businesses but those who aren't won't." CableWorld, June 26, 1995.

¹² The fact that consumers currently must use a 36" dish to receive PRIMESTAR's medium-powered service has been the basis of negative advertising directed against PRIMESTAR by DirecTV. See advertisement attached to these comments.

compared to PRIMESTAR's current 25/75 balance, supports this analysis.¹³

III. THERE IS ABSOLUTELY NO EVIDENCE OF ANTICOMPETITIVE BEHAVIOR TO JUSTIFY ANY RESTRICTION PROPOSED IN THE NPRM

A. The Commission's Fears of Anticompetitive Behavior Lack Factual Support

Absent actual evidence of anticompetitive behavior, the Commission should not even consider imposing the restrictions contemplated in the NPRM. Significantly, the NPRM is devoid of any evidence of anticompetitive behavior by a cable operator with regard to DBS. Curiously, in the entire 48-page NPRM, the Commission never mentions the fact that PRIMESTAR, a medium-power DBS service owned by GE Americom and four MSO's including Continental, has been in business for 4 years without acting in an anti-competitive manner.

The Commission's premise that MSO participation in the DBS business could reduce competition is entirely theoretical. To the best of Continental's knowledge, no complaints have been filed against PRIMESTAR with the Commission. Similarly, no complaints have been lodged with the Department of Justice ("DOJ") or the 40 state attorneys general with whom PRIMESTAR and its owners entered into Consent Decrees. These Decrees, which are discussed fully below, constitute an independent basis for declining to adopt the restrictions proposed in the NPRM.

¹³ Sky Report, at 3 (November 1995).

B. PRIMESTAR Competition To DirectTV and USSB Has Benefited Consumers

Indeed, PRIMESTAR has offered meaningful DBS competition to DirectTV and USSB and has been a positive factor for consumers. For example, until recently, in order to receive DirectTV on a single TV set, consumers had to pay \$700 for a satellite dish and receiver and a \$200 installation charge, plus monthly programming fees beginning at \$21.95/month (\$29.95/month including USSB's basic package) and rising to as much as \$65/month. Competition from PRIMESTAR, which, without a \$700 up-front dish/receiver fee, still maintains monthly basic service and equipment rates as low as \$25.95, forced DirectTV to introduce financing packages which enable consumers to pay the \$700 over a 48-month time period.¹⁴

C. The Proposed Restrictions Are Contrary to Congressional Policy of Increasing Competition by Removing Barriers to Entry in Telecommunications Businesses

The NPRM's conclusions are particularly incomprehensible in light of recent Congressional initiatives seeking to eliminate cross-ownership restrictions and other barriers to entry that are no longer necessary to jumpstart a competitive marketplace. For example, both the House and Senate telecommunications bills remove restrictions on telephone company construction and ownership of video programming platforms or cable systems within

¹⁴ This new DirectTV pricing alternative still results in an equivalent consumer finance rate of 24.9% for purchased equipment.

its service area.¹⁵ Similarly, both bills remove state and local restrictions on the ability of "any entity" to provide interstate or intrastate telecommunications service.¹⁶ Ironically, the Commission is moving in just the opposite direction in the NPRM.¹⁷ Reconciling Congress' sweeping removal of ownership restrictions with the limitations contemplated in the NPRM would require considerable imagination.

IV. NO FACTUAL OR LEGAL PREDICATE EXISTS FOR THE IMPOSITION OF INTRUSIVE, MARKET-DISTORTING OWNERSHIP REGULATIONS UPON CABLE OPERATORS PARTICIPATING IN DBS

In an apparent rush to judgment about the competitive status of the DBS business, the Commission articulated a set of tentative conclusions which are seriously flawed. As demonstrated below, these conclusions are based on an inaccurate factual predicate and, therefore, are simply wrong as a matter of law and public policy. As noted above, the DBS market is aggressively competitive and the presence of MSO-owned PRIMESTAR has enhanced -- not harmed -- consumer welfare.

¹⁵ S. 652, 104th Cong., 1st Sess. § 202(a-b) (1995) ("Senate Bill"); H.R. 1555, 104th Cong., 1st Session § 201(a) (1995) ("House Bill").

¹⁶ Senate Bill § 201; House Bill § 101.

¹⁷ Moreover, although the pending legislation expressly vests jurisdiction over DBS services in the Commission, it does not require cross-ownership limitations. Nor can it be argued that Congress has not considered imposing cross-ownership restrictions between cable and DBS. In 1992, Congress considered and rejected imposing such restrictions. H.R. Conf. Rep. No. 862, 102d Sess. 55 (1992).

A. DBS Is A Highly Successful and Competitive Business

The structural and behavioral restrictions proposed in the NPRM are particularly unnecessary given the unprecedented growth and success of the DBS business. According to recent statistics, the DBS business has grown 104% in the last six months.¹⁸

DirectTV experienced 18.8% growth in the last month alone!¹⁹

Consumers purchased more than one million DBS dishes in their first year of availability.²⁰ By contrast, only 35,000 CD players, 120,000 VCRs, and 115,000 big screen televisions were sold in their introductory years. The DBS dish is by far the fastest selling consumer product in history.

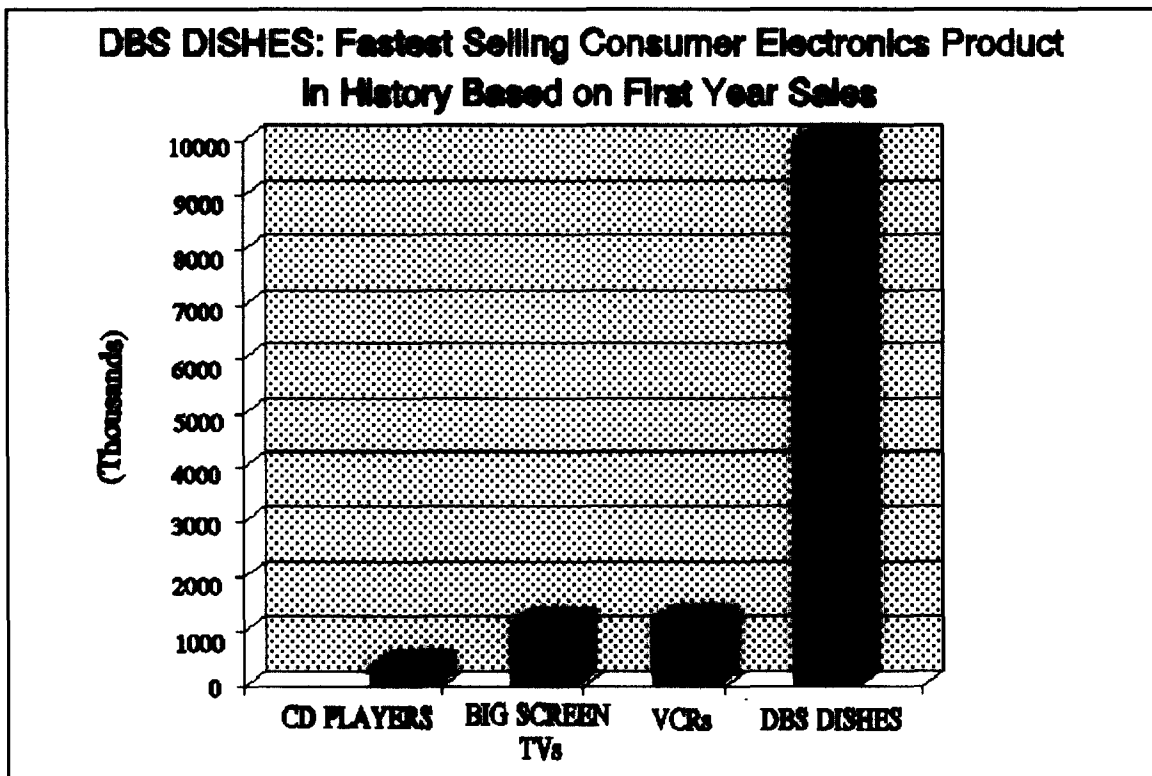
The DBS business is booming. Non-cable DBS operators are thriving. What is the rationale for the Commission's headlong rush to impose complicated and draconian economic regulations in such a market? This is a classic example of a solution in search of a problem. Continental fails to perceive any basis on which the Commission could conclude that MSO participation has harmed competition in the DBS business.

Not only is the DBS business successful, it is highly competitive. The business includes DirectTV, a subsidiary of Hughes Communications Galaxy, which itself is a subsidiary of General Motors. General Motors has assets worth more than \$190

¹⁸ Sky Report, at 6 (November 1995).

¹⁹ Id.

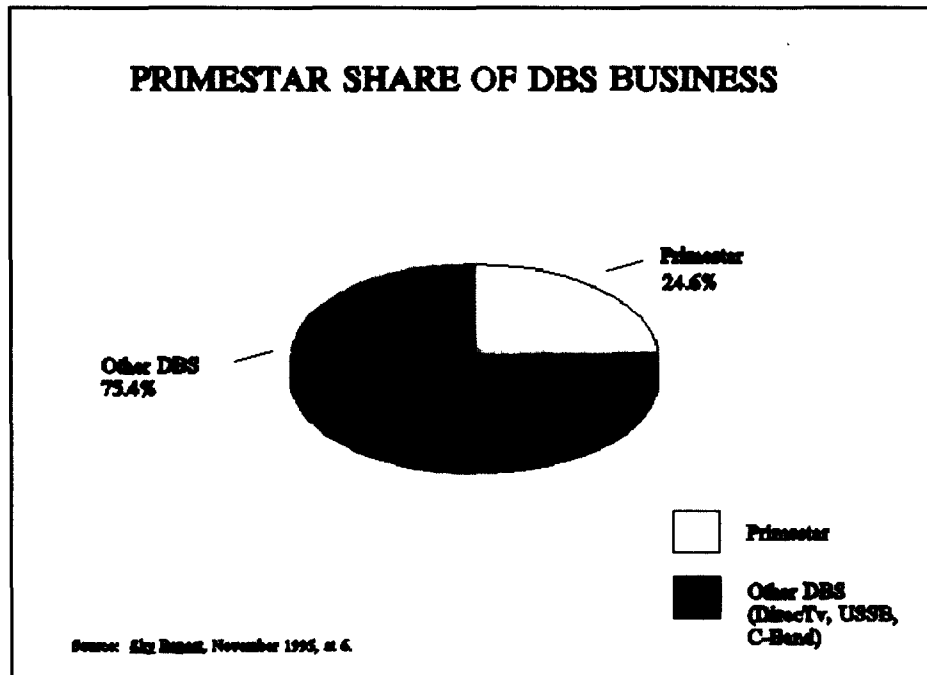
²⁰ DirectTV Comments in the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 95-61, at 5-6.



billion and annual sales and revenues of \$125 billion. It should be no surprise that DirecTV spent more than \$100 million on DBS advertisements in its first year of operation. The DBS business also includes Hubbard Broadcasting Inc., the parent of USSB. Hubbard owns seven television stations, two radio stations, a news agency, two production companies, and co-owns the All News Channel. Hubbard has more than 70 years experience in radio and video distribution. Finally, there are nearly 20 national distributors of C-Band satellite video services. New C-Band authorizations increased by 25,125 in October 1995.²¹

²¹ Sky Report, at 6 (November 1995).

Along with PRIMESTAR, these companies serve approximately 4.32 million DBS customers. PRIMESTAR has approximately 880,000 subscribers, or only 20.4% of the satellite television business.



What is the rationale for restricting PRIMESTAR's participation in the business? Clearly, PRIMESTAR lacks market power; hence, its ability and right to participate fully in DBS should not be restricted by regulatory fiat.

Moreover, numerous new competitors are waiting in the wings to enter the DBS business. These include the five non-cable affiliated companies currently authorized to construct DBS systems, two of whom (EchoStar and Directsat) are expected to initiate service in the near future,²² as well as the 11 companies which recently filed Ka-Band satellite applications to

²² Notice at ¶ 10.

provide video and/or multimedia services.²³ Ka-Band applicants include AT&T, Hughes Communications Galaxy, Lockheed, GE American Communications, and PanAmSat, among others.

NON-MSO DBS COMPANIES

Hughes Communications Galaxy, Inc.
United States Satellite Broadcasting Co., Inc.
EchoStar Satellite Corporation
Direct Broadcast Satellite Corp.
Directsat Corporation
Dominion Video Satellite, Inc.
Continental Satellite Corporation

**NON-MSO KA BAND SATELLITE
APPLICANTS**

AT&T Corp.
Comm, Inc. (affiliated with Motorola)
EchoStar Satellite Corporation
GE American Communications, Inc.
Hughes Communications Galaxy, Inc.
Lockheed Martin Corporation
NetSat 28 Co., L.L.C.
Morning Star Satellite Corporation
Norris Satellite Communications, Inc.**
PanAmSat Licensee Corp.
VisionStar, Inc.

MSO DBS COMPANIES

Tempo Satellite, Inc.
PRIMESTAR*

**MSO-AFFILIATED KA-BAND
APPLICANTS**

None

* Medium Power Ku-band Fixed Satellite Service, currently in operation.

** License granted in 1992 - Norris Satellite Communications, Inc., 7 FCC Rcd. 9289 (1992).

In sum, DBS competition is vibrant. Cable operators cannot reasonably be viewed as having "cornered the market" in DBS. Rather, MSO-affiliated DBS constitutes only a small part of a

²³ See, Public Notice, Ka-Band Satellite Applications Accepted for Filing, DA 95-2273, November 1, 1995.

business that is, has been, and will remain hotly contested. Accordingly, the myopic approach of the NPRM should be rejected.

B. The MVPD Marketplace Is Increasingly Competitive

As the Commission recognized in the NPRM, the DBS business cannot fully be understood without reference to the broader multichannel video distribution marketplace, of which DBS is only a subset.²⁴ This marketplace is increasingly competitive. In 1995, 5.8 million consumers purchased multichannel video services from non-cable MVPDs²⁵ and the total number of non-cable subscribers is projected to expand by 300 percent within 5 years.²⁶

In particular, the rapid entry of telcos into the video distribution business has transformed the competitive dynamics of the marketplace. Consider the following facts:

- Federal courts have eliminated the cable-telco cross-ownership ban.²⁷ The FCC has granted authority to

²⁴ The Commission recognizes this larger marketplace in the NPRM at ¶ 33.

²⁵ NCTA Comments in CS Docket No. 95-61 at 5 ("NCTA Comments").

²⁶ Id.

²⁷ See Chesapeake & Potomac Tel. Co. of Virginia v. U.S., 42 F.3d 181 (4th Cir. 1994), rehearing denied (January 18, 1995), cert. granted, 63 USLW 3899, 63 USLW 3906 (June 26, 1995) (Nos. 94-1893, 94-1900) (C&P v. U.S.); US West, Inc. v. U.S., 855 F.Supp 1184 (W.D. Wash. 1994), aff'd US West, Inc. v. US, 48 F.3d 1092 (9th Cir. 1995); BellSouth Corp. v. U.S., 868 F.Supp 1335 (N.D. Ala. 1994), appeal pending 11th Cir. No. 94-7036; Ameritech Corp. v. U.S., 867 F.Supp 721 (N.D. Ill. 1994), appeal pending 11th Cir. No. 94-7036; NYNEX Corp. v. U.S., No. 93-1523 (D. Me. December 8, 1994), appeal pending 1st Cir. No. 95-1183; GTE (continued...)

build video dialtone networks passing millions of homes.²⁸ Telcos have been awarded cable franchises in their service areas.²⁹ Telcos have invested millions of dollars to purchase MMDS systems which give them instant access to video distribution networks.³⁰

- Where telcos compete in a new business, they swiftly capture significant market share. For example, telcos now control 65% of all cellular licenses in the top 20 U.S. markets, which only eight years ago were 50% served by non-telcos.³¹
- Telcos have formed a consortium to purchase four million digital set-top boxes to build video networks (the largest digital video purchase order ever).³² Similarly, telcos have banded together in joint ventures to invest millions of dollars in programming ventures.³³

²⁷(...continued)

South, Inc. v. U.S., No. 94-1588-A (E.D. Va January 13, 1995); Southwestern Bell Corp. v. U.S., Civ. A. No. 3:94-C-0193-D (N.D. Tex. March 27, 1995); United States Tel. Ass'n v. U.S., No. 1:94CVO1961 (D.D.C. Feb. 14, 1995); and Southern New England Tel. Co. v. U.S., No. 3:94-CV-80 (DJS) (D. Conn. April 28, 1995).

²⁸ See, e.g., New Jersey Bell Tel. Co., 9 FCC Rcd 3677 (1994) (granting authorization of Dover Township, New Jersey video dialtone system).

²⁹ See, e.g., Ameritech New Media Enterprises, Inc., W-P-C-7106, Order, released September 28, 1995.

³⁰ See, Gibbons, Kent, "Wireless Op Receives \$100 million from Baby Bells, Multichannel News, Apr. 3, 1995, at 58; Naik, Gautam, "PacTel to Buy Tiny Wireless Cable Firm for \$120 million to Speed Video Project," The Wall Street Journal, Apr. 18, 1995, at A4.

³¹ Donaldson, Lufkin, Jenrette, "The Wireless Communications Industry," Summer 1994, pp. 59, 60.

³² See Ellis, Leslie, "Three Baby Bells Issue Set-Top RFP," Multichannel News, March 6, 1995, at 1.

³³ See, Dubrowski, Jerry, "Three Baby Bells Aim to Revolutionize TV Industry," The Reuter Business Report, May 9, 1995.

Given this aggressive level of activity, it is not surprising that Bell Atlantic CEO Ray Smith recently bragged that "[B]y 2000, we'll have 50% of the cable TV business -- no doubt about it.... Meanwhile, the cable companies won't have even three percent of telephony revenues in their best market."³⁴

V. THE PROPOSAL TO EXTEND THE PROGRAM ACCESS RULES TO MSO-AFFILIATED DBS OPERATORS IGNORES THE STATE OF THE PROGRAM BUSINESS AND EXISTING SAFEGUARDS

In the NPRM, the Commission proposes to impose program access regulations on PRIMESTAR based on a totally theoretical concern that in the absence of such regulations PRIMESTAR will act anticompetitively. Although the NPRM characterizes the proposed restrictions as "Conduct Rules to Protect Competition," the rules in fact only protect PRIMESTAR's competitors (emphasis added). Once again, the Commission has chosen to ignore marketplace evidence which proves that such concerns are unfounded.

DirectTV and USSB have obtained access to virtually all the cable services distributed by PRIMESTAR and cable systems affiliated with its MSO owners.³⁵ Combined, DirectTV and USSB

³⁴ Wired, February 1995.

³⁵ HBO and Showtime have provided their services on a limited exclusive basis to USSB. The exclusivity operates against DirectTV, but not against any other MVPDs. The Commission found that such exclusivity is permitted under the program access rules. Implementation of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-265, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 3105, 3121-22 (1994). The fact that HBO and Showtime, two services vertically integrated with cable operators, chose to grant
(continued...)

offer 26 movie channels, five network channels, five music channels, 29 digital audio channels, 21 sports channels, 77 pay-per-view channels, 24 variety channels, and 13 news and information channels.

Moreover, it is ironic that DirectTV, which operates without program access restrictions, has obtained exclusive rights to popular sports programming, including National Football League and NBA basketball games. This valuable programming is not available to PRIMESTAR or cable customers.

Finally, the NPRM completely ignores the fact that these issues were fully considered by the DOJ and 40 state attorneys general over a two year period in connection with PRIMESTAR's plan to enter the DBS business. As a result of these inquiries, PRIMESTAR made adjustments to its business plan and voluntarily entered into Consent Decrees which found no anti-competitive behavior on PRIMESTAR's part but, as a prophylactic measure, imposed certain behavioral restrictions.³⁶ Recognizing that DBS was still a fledgling business in early 1993, the Consent Decrees were given a limited duration, sufficient to ensure the emergence of a competitive DBS business without permanently restricting

³⁵(...continued)
exclusivity to USSB, a non-cable DBS provider, and not PRIMESTAR, underscores the lack of any anticompetitive concern that would justify extension of program access to PRIMESTAR.

³⁶ U.S. v. PRIMESTAR Partners, L.P., Final Judgement, 1994 U.S. Dist. LEXIS 14978, Civ. Act. No. 93 Civ. 3913 (S.D. New York April 5, 1994); New York v. PRIMESTAR Partners, Final Judgement, 3 Civ. Nos. 3868-3907 (S.D. New York 1994).

PRIMESTAR's behavior. Thus, certain terms of the Decrees sunset in 1997, others in 1999.

In many respects, the states' Consent Decree exceeds the requirements of the 1992 Cable Act. For example, the states' Decree prohibits any PRIMESTAR owner from entering into any exclusive contracts for affiliated regional sports networks and certain national programming services owned individually or collectively by PRIMESTAR owners.³⁷

The Decrees also prohibit PRIMESTAR owner-affiliated programmers from refusing to deal with non-PRIMESTAR DBS operators, MMDS providers or non-PRIMESTAR cable operators, and require that the programming be made available on reasonable business terms.

While the Consent Decrees impose certain behavioral restrictions on PRIMESTAR's MSO owners, DOJ and the state attorneys general specifically declined to impose structural restrictions. To the contrary, the Decrees contemplate PRIMESTAR's full participation in DBS. Given the breadth of the investigation which preceded the Decrees, the fact that DOJ and the state attorneys general decided not to restrict DBS ownership by the PRIMESTAR owners should weigh heavily on the Commission's analysis in this proceeding.

³⁷ While the 1992 Cable Act grants the Commission authority to approve waivers to the exclusivity restrictions, the states' Decree does not. Thus, under the Decree, there can be no consideration of factors which might weigh in favor of exclusivity, such as the positive effect on competition, the enhanced ability of new programmers to raise capital and gain distribution, and increased program diversity.

The Justice Department and state attorneys general are the expert antitrust authorities and there is no need for the Commission to duplicate their efforts. As previously noted, certain Decree provisions will remain in force until 1997, others until 1999. Even if the Commission does not believe the DBS business is yet fully competitive -- a conclusion which Continental disputes -- it is irrefutable that competition is evolving rapidly. By the time the Decrees sunset, the competitive dynamics of the DBS business are certain to have advanced significantly. Moreover, the Commission already has a mechanism to monitor the ongoing state of competition in the DBS business -- the annual report on competition in the video marketplace required by Section 628(g) of the Communications Act of 1934, as amended, 47 U.S.C. § 548(g). Thus, there is no reason for the Commission to take any action today with respect to DBS competition. Should any competitive strains develop in this business, the Commission has ample tools to fix them.

VI. RESTRICTIONS ON CABLE/DBS MARKETING WOULD SERVE ONLY TO LIMIT THE DEVELOPMENT OF COMPETITION IN THE TELECOMMUNICATIONS MARKET GENERALLY

The limitations of the Tempo II decision should not be extended to PRIMESTAR (or its owners) or other future MSO-affiliated DBS operators, because such extension would inhibit the ability of PRIMESTAR distributors and owners to compete in the DBS and larger MVPD marketplace. In the NPRM, the Commission ignores the fact that in the constantly evolving marketplace, packaging and cross-promotion are critical to the ability of MSOs

such as Continental to provide local phone service and interexchange phone service, while at the same time remaining competitive in video services.

The telecommunications marketplace is filled with examples of this concept in practice. For instance, Continental and AT&T have just announced a joint marketing trial in Chicago. Cox Cable is offering consumers free basic cable service with phone service in Omaha. The Sprint Telecommunications "Triple Play" venture is premised on the concept of independently owned but jointly packaged services. Every RBOC has plans either to construct joint video/telephone networks in order to package video and phone service (e.g., Bell Atlantic's Dover Township video dialtone system), or to construct separate facilities and market the services jointly (e.g., Ameritech's Plymouth Township stand-alone cable system).

The Commission's proposed marketing limitations would unreasonably restrain MSOs' ability to structure and market their services so as to enhance consumer choice and to compete to provide numerous interrelated services simultaneously. In short, the proposal in the NPRM would compartmentalize and homogenize video services when market forces are driving competitors to provide differentiated products in combined packages. Governmental interference with this process will stunt the development of broad-based competition for all communications services, voice, video or data. The proposed marketing restrictions should be rejected.

VII. THE COMMISSION SHOULD IMPOSE A SPECTRUM FEE ON ANY DBS OPERATOR THAT HAS NOT PAID FOR SPECTRUM IN AN AUCTION

The Commission already has put PRIMESTAR at a competitive disadvantage by arbitrarily reclaiming the channels and orbital locations held by Advanced Communications, which PRIMESTAR had contracted to utilize. Auction of DBS spectrum for one high-power DBS provider, while allowing existing high-power licensees to escape such an obligation, creates a competitive imbalance with a direct, immediate effect on the bottom line. The Commission's Advanced³⁸ decision creates an enormous economic advantage for DirecTV, USSB, and other DBS licensees who were given free use of the spectrum. By contrast, any successful bidder for the frequencies to be auctioned as a result of Advanced will incur an enormous up-front cost to enter the business.

For example, DirecTV's and USSB's existing spectrum is comparable to that which one party, MCI, has indicated could be worth \$300-700 million. If the Commission truly desires a competitive DBS business, then it should examine what fees incumbent DBS providers should pay to the government for use of this valuable spectrum and put in place a system under which any DBS licensee which has not obtained its channels and orbital location by auction would pay an annual usage fee to the

³⁸ Advanced Communications Corp., FCC 95-428 (adopted Oct. 16, 1995) ("Advanced").


government.³⁹ Not only would such an approach correct a glaring competitive imbalance, it would benefit the American taxpayer by providing "revenue ... to reduce the deficit."⁴⁰

VIII. CONCLUSION

For the foregoing reasons, Continental respectfully requests that the Commission reject the proposed structural and behavioral limits on cable participation in the DBS business.

Respectfully submitted,

CONTINENTAL CABLEVISION, INC.



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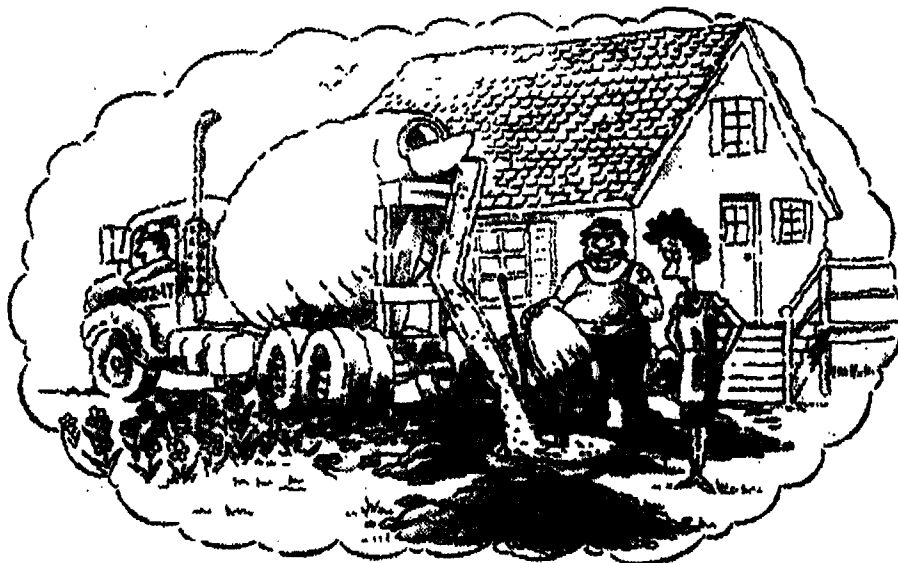
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³⁹ In this regard, it should be noted that cable operators pay nearly \$1 billion/year in franchise fees to state and local governments for their use of public rights of way.

⁴⁰ See, News Release, "FCC Reinvents Government With Billions for Treasury," March 27, 1995.

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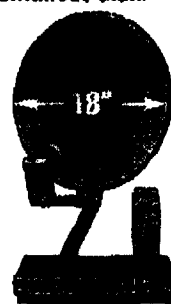
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